

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD DOUGLAS RHINES,

Defendant-Appellant.

UNPUBLISHED

March 17, 2011

No. 296649

Shiawassee Circuit Court

LC No. 09-008302-FC

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant was charged with felony murder, MCL 750.316(1)(b), and first-degree home invasion, MCL 750.110a(2). A jury convicted defendant of the lesser offense of voluntary manslaughter, MCL 750.321, and acquitted on the offense of home invasion. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to a prison term of 200 to 480 months. Defendant appeals as of right. We affirm.

Defendant's conviction arises from the stabbing death¹ of Vern Daniels. The prosecution's theory was that defendant was separated from his wife, Jamie, who was living in an apartment in Owosso with her two daughters. According to the prosecution, Jamie was in bed with Daniels, after having earlier engaged in sexual relations with him, when her young daughter, Kaylie, who suffers from cerebral palsy and has significant communications deficiencies, could not sleep and came into bed with them. Daniels was sleeping next to the wall, and Jamie was lying between Daniels and Kaylie, who was on the outside edge of the bed. During the evening, defendant broke into the house through the kitchen door, discovered Daniels in bed with Jamie, and attacked him using knives he took from the kitchen.

The defense theory was that defendant and Jamie were still married on the night in question. Defendant would live at his mother's house during the week because it was closer to his job at a dairy farm, but would return to the apartment on the weekends. He was aware that Jamie had sexual affairs with men in the past. On the night of the incident, he rode his motor

¹ The medical examiner testified that Daniels suffered 14 stab wounds.

scooter to the apartment and from outside the bedroom window he heard sounds he interpreted as Jamie having sexual relations. He forced his way into the apartment and went to the bedroom where, according to defendant's testimony, he pulled the covers off the bed and saw Daniels lying in the bed, naked from the waist down, with his exposed genitals near Kaylie's face. Defendant acknowledged being angry, retrieving a knife from the kitchen, and engaging in a physical confrontation with Daniels. Defendant did not dispute that he caused the wounds which led to Daniels' death, but asserted that he was acting in defense of himself and Kaylie.

Defendant argues that the trial court erred by allowing the prosecutor to introduce evidence under MRE 404(b) for the purpose of showing intent and motive. We review this preserved evidentiary issue for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

Before trial, the prosecutor filed a notice of intent to introduce evidence regarding an incident that occurred in October 2005 when defendant, after arguing with Jamie in the kitchen, grabbed a knife and pointed it at her, telling her he wanted to kill her.² The prosecution asserted that the evidence was admissible under MRE 404(b) to show a common scheme or plan, an absence of accident, and to show defendant's intent in the present case. The prosecutor noted that the October 2005 incident involved the same weapon, the same location, and a threat of death or murder. Defendant objected to admission of the evidence, arguing that it was unduly prejudicial, unrelated to the charges at issue, and remote in time to the present incident. A hearing was held regarding the admissibility of the evidence on August 25, 2009. The trial court ruled that the evidence would be admissible for the limited purpose of showing motive and intent.

Other acts by a criminal defendant are inadmissible to prove character except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The list is not exclusive. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). For evidence of other acts to be admissible under MRE 404(b), it must: (1) be offered for a proper purpose, (2) be relevant, and (3) not have a probative value substantially outweighed

² Defendant pleaded guilty of assault with a dangerous weapon.

by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). The admissibility of other acts evidence will be reversed on appeal only when there has been a clear abuse of discretion, *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005), and it appears more probable than not that the error was outcome determinative. *Lukity*, 460 Mich at 495-496.

A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). Defendant's theory of the case was that he was angry and that he grabbed a knife and stabbed Daniels in defense of him or Kaylie. The prosecutor asserts that the evidence of defendant's other act was relevant to rebut defendant's claim that he acted in defense of him or Kaylie and to show that defendant had a motive or some kind of intent to cause harm to the victim. To prove defendant was guilty of felony murder, the prosecution had to prove the killing of a human being with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result during the commission of a felony. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007).

At trial, defendant maintained that he was defending himself and Kaylie. Evidence that defendant had on another occasion become angry, grabbed a kitchen knife, and threatened to kill upon learning of Jamie's infidelity was highly relevant to prove defendant's motive, that he intended to kill Daniels that night, and that he was not acting in defense of himself or Kaylie. The probative value of the evidence was not significantly outweighed by the potential for unfair prejudice.

Even assuming the evidence was improperly admitted, reversal is unwarranted. Defendant cannot show that any error affected defendant's substantial rights, which "generally requires defendant to show that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). There was a great deal of evidence establishing defendant's guilt independent of any other acts evidence. Any error in permitting the evidence of his prior bad acts was not outcome determinative. See *People v Bartlett*, 197 Mich App 15, 20; 494 NW2d 776 (1992) ("Any error in permitting the introduction of evidence of the prior convictions was harmless given the overwhelming evidence of guilt in this case.").

Defendant also argues that the trial court erred in scoring Offense Variables (OVs) 3 and 7. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, to the extent that a scoring issue calls for statutory interpretation, this Court's review is de novo. *Id.*

Defendant first contends that the trial court erred in scoring 25 points under offense variable (OV) 3 when the sentencing offense was a homicide.

OV 3, which addresses physical injury to the victim, states, in pertinent part, as follows:

(1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and *by assigning the number of points attributable to the one that has the highest number of points*:

(a) A victim was killed 100 ... points

* * *

(c) *Life threatening or permanent incapacitating injury occurred to a victim ... 25 points*

(d) Bodily injury requiring medical treatment occurred to a victim ... 10 points

(e) Bodily injury not requiring medical treatment occurred to a victim ... 5 points

(f) No physical injury occurred to a victim ... 0 points

(2) All of the following apply to scoring offense variable 3:

* * *

(b) *Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.* [MCL 777.33 (emphasis added).]

In interpreting OV 3, the Michigan Supreme Court has declined to read subsection (2)(b) as prohibiting a trial court from scoring *any* points for OV 3 when the sentencing offense is homicide. *People v Houston*, 473 Mich 399, 402; 702 NW2d 530 (2005). In *Houston*, the defendant was convicted of second-degree murder for the shooting death of the victim. *Id.* at 401-402. During sentencing, the trial court scored 25 points under OV 3 because the victim suffered an injury—a gunshot wound. *Id.* at 401. The defendant argued that, based on subsection (2)(b), he should not have been assessed any points for OV 3 because his sentencing offense was a homicide and none of the other point levels were applicable to circumstances where the victim was killed. *Id.* at 401, 405.

In declining to disallow any scoring where a homicide occurred, the Supreme Court reasoned that, in the process of killing the victim, the defendant first caused a physical injury to the victim. *Houston*, 473 Mich at 402, 406. And the Court observed that subsection (1)(f) calls for zero points *only* when *no* physical injury occurred to the victim. *Id.* at 406. The Court explained, “The Legislature has explicitly eliminated the option of assessing one hundred points in homicide cases, but not the requirement of assessing the ‘highest number of points’ possible.” *Id.* at 409. The Court posited:

If the Legislature ... had intended to preclude the scoring of *any points* where the sentencing offense is a homicide, why did it only specifically preclude the scoring of *one hundred points*? Indeed, that the Legislature precluded the

scoring of *one hundred points* where the sentencing offense is a homicide suggests that the Legislature intended *some points* to be scored where the sentencing offense is a homicide. [*Id.* at 406 n 15 (emphasis on original).]

The Court concluded that scoring was therefore appropriate under the remaining subsections when there was physical injury, even though the injury resulted in death. *Id.* at 407. The Court clarified that even a death that occurs instantaneously is still the result of an injury and capable of scoring under OV 3. *Id.* at 407 n 16. Therefore, according to the Court, subsection (1)'s direction that the highest possible number of points must be assessed, meant that the proper scoring choice was 25 points under subsection (1)(c). *Id.* at 407.

Writing for the dissent, Justice Cavanagh insisted that there is a difference between a "life-threatening" injury and a "life-ending" injury. *Id.* at 411 (CAVANAGH, WEAVER, and Marilyn KELLY, JJ., *dissenting*) (emphasis in original). Therefore, he disagreed with the majority that OV 3 applies to a situation when the victim dies. *Id.* According to Justice Cavanagh, "an ordinary reading of the statute's phrase 'life threatening ... injury' indicates a situation in which a person receives an injury that threatens, but does not take, the person's life." *Id.* Therefore, Justice Cavanagh expressed his disinclination to equate the two terms. *Id.* at 411-412. Justice Cavanagh found "unpersuasive the argument that had the Legislature intended to exclude a situation in which a victim dies from the '[l]ife threatening or permanent incapacitating injury' condition specified by MCL 777.33(1)(c), it would have said so." *Id.* at 412. Justice Cavanagh explained that, plainly read, a "life threatening" or "permanent incapacitating injury" presumes that the person has survived the attack. *Id.* at 413. He contended that "[h]ad the Legislature intended that a potentially fatal injury include an injury actually causing death, it would have said so." *Id.* at 412. Justice Cavanagh opined that "the Legislature likely did not foresee an attempt to equate a potentially fatal injury with a fatal one." *Id.* According to Justice Cavanagh, "The majority's reasoning ... illuminates that its position is not true to the plain language of the statute or the Legislature's intent." *Id.* at 413. Thus, Justice Cavanagh concluded, "If homicide is an element of the sentencing offense, a defendant should not be assessed any points for OV 3, even if the victim could be considered to have suffered an 'injury' before dying." *Id.* at 415.

Defendant concedes that the majority's opinion in *Houston* is dispositive of this issue and the trial court's scoring decision is correct under *Houston*, but argues that the dissent in *Houston* gives the proper interpretation. He explains that he raises this argument in hopes of creating a chance to bring it before the Michigan Supreme Court and then urge that Court to overrule *Houston*. However, it is the Supreme Court's obligation to overrule or modify its decisions. *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009). And until that Court takes such action, the Supreme Court's decision in *Houston* binds this Court and all lower courts. *Id.*

Therefore, applying the *Houston* interpretation to this case, the trial court properly scored defendant's offense at 25 points under MCL 777.33(1)(c) for inflicting a "life threatening ... injury ... to a victim."

Defendant also argues that the trial court incorrectly scored 50 points for OV 7. MCL 777.37 provides:

(1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense ... 50 points

Here, defendant grabbed a knife and stabbed Daniels twelve times before the knife broke. Defendant then grabbed a second knife and stabbed Daniels twice more. Defendant pushed Daniels into the refrigerator, embedding the broken knife into Daniels' back. Daniels tried to stop the fight by heading towards the door. As Daniels was leaving the house, defendant kicked him in the back as Daniels was asking defendant why he was doing this. Daniels underwent emergency surgery to repair his liver, lung, and gallbladder in an attempt to save his life and to remove the knife blade from his back. The record supports the trial court's scoring of 50 points for OV 7, and its decision fell within the principled range of outcomes. *People v Blunt*, 282 Mich App 81, 88-89; 761 NW2d 427 (2009); *People v Wilson*, 265 Mich App 386, 396-398; 695 NW2d 351 (2005).

The sentencing guideline statutes provide that a defendant who is being sentenced as an habitual offender, fourth offense, for a conviction manslaughter, whose total OVs are greater than 74 points (Level VI) and whose Prior Record Variable (PRV) is 30 (Level D) must be sentenced to a minimum of 50 to 200 months in prison. See MCL 777.65 (governing the minimum sentencing range for manslaughter); MCL 777.21(3)(c) (governing the sentencing guideline range for a fourth or subsequent felony). Here, defendant's OVs totaled 140 points, and his PRV total was 30 points. Thus, the sentencing information report correctly recommended a minimum range of 50 to 200 months imprisonment. OV 7 was scored at 50 points. Even if OV 7 had been scored at zero points, the total score for all the OVs would have been 90 points. As an OV total of 90 points is greater than a score of 74 points, defendant would remain in OV Level VI and his minimum sentencing range would still have been between 50 and 200 months. Consequently, even assuming that the trial court incorrectly scored OV 7, any error is harmless. An erroneous score that would not, when corrected, result in a different recommended range does not require resentencing. *People v Francisco*, 474 Mich 82, 89-89 n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Patrick M. Meter